

How populist authoritarian nationalism threatens constitutionalism or: Why constitutional resilience is a key issue of our time

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Constitutional Resilience How populist authoritarian nationalism threatens constitutionalism or: Why constitutional resilience is a key issue of our time Mattias Kumm Do 6 Dez 2018

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The problem with movements and parties spearheaded by “populist” leaders such as Putin, Erdoğan, Orbán, Kaczyński or Trump is not that they happen to embrace more nationally focused policies that metropolitan elites widely condemn as unjust, ineffective or otherwise misguided. Nor is the problem that they embrace a confrontational political style and uncouth rhetoric at odds with the mores of reflexively enlightened society in political capitals across liberal constitutional democracies. Neither of those features would constitute a constitutional threat justifying sustained reflections on constitutional resilience. The problem with electoral successes of populist authoritarian nationalists is that they pose a fundamental threat to liberal constitutional democracy.

The nature of that threat may on occasion be obscured by the rhetorical embrace of democracy by populist authoritarian nationalists. When the human rights of critical journalists are violated, when the independence and impartiality of the judiciary and the separation of powers are threatened, when representatives of international civil society and NGO’s are described as foreign meddlers and the European Union and international institutions are fundamentally discredited as illegitimate, such positions are defended in the name of democracy. All populist authoritarian nationalists claim to be good democrats and discredit their opponents as undemocratic. In current debates democracy has become a term that is being used as a bludgeon against liberal constitutional democracy to help bring about the transition towards a new order. That new order, which is described as “illiberal”, “guided” or “sovereign” democracy is conceived as opposed to and an alternative to liberal constitutional democracy.

It would be too quick to simply dismiss this appropriation of democracy as an intellectually bankrupt exercise of politically motivated rhetorical obfuscation. Claims, that democracy and the institutions of the modern constitutional state are not necessary complements but stand in tension to one another and are based on different presuppositions, have a pedigree among modern constitutional theorists that goes back at least to Carl Schmitt’s Rousseau inspired theory of democracy and remains alive and well even among some mainstream constitutional theorists today.^[1] At the heart of such a conception of democracy is the idea of a unified will of the people as the foundation of all political legitimacy. The idea of a unified political will as the foundation of all political legitimacy explains four problematic anti-constitutionalist features of national-authoritarian ideologies.

First, populists have problems with the idea of legitimate opposition. They are, as Jan-Werner Müller has described elaborately[2], anti-pluralist. Populists claim to represent the whole of the people. Those against them must either be corrupt, incompetent or treasonous – in the service of cosmopolitan capital interests or foreign powers – or do not belong to the authentic people. The idea of legitimate opposition, on the other hand, is central to liberal constitutional democracy. No genuine democracy without legitimate opposition. Free and equals practicing collective self-determination should be able to agree on basic constitutional principles. Beyond that the minority defeated in the democratic process is not expected to give up its own convictions about what justice and good policy require. They are not required to accept the majority decision to have been the correct one. The continued existence of a plurality of competing opinions and parties is not seen as a symptom of crisis or decay, or a *modus vivendi* to tolerate for so long as more oppressive uniformity enforcing measures remain counterproductive or otherwise unfeasible. Minority dissent is an ordinary state of affairs in an open society in which the freedom of speech among free and equals is secured. The minority is under a duty to accept the majority decision as legally binding, but retains the right to politically fight for a different policy, including the replacement of the current government with a different one, without having to fear repressions, sanctions or otherwise being discriminated against.

Second, populists have problems with the idea of procedural legitimacy. Separation of powers, formalities and legal procedures central to constitutional due process are seen not as the means of deliberative will-formation and democratic will construction, but as a Trojan horse for well-organized political elites to sabotage and subvert the authentic democratic will. In the political imagination of populists there is nothing between the people and their representatives, and it's not unusual to claim that the people and its leadership are identical. Donald Trump, for example, claimed on occasion of his inauguration that with his election not another party would rule in Washington, but the people themselves. The formalities of democratic procedures, separation of powers, the independence of the press, the impartiality and independence of the courts, all these are potential obstacles to effectively implement the authentic will of the people, if these institutions can't be made into effective tools for implementing and creating further resonance for the authentic will of the people as determined by the leadership. In this way the relationship between populists and institutions is purely opportunistic: Whatever helps to secure the effective implementation of the people's will is legitimate, whatever is an obstacle to it is illegitimate. In practice, however, referenda, under conditions where the public media and the security apparatus is firmly in the hand of the dominant party, may be a reliable procedure of choice. Elections, too, can generally be relied on to produce the right results under the right kind of conditions and need not be formally abolished. But informal acclamation, too, is proof of legitimacy. It is not surprising that Trump (erroneously) insists that there were more people present at his inauguration than at any other previous inauguration. But generally, legitimation does not occur by way of procedure, instead the legitimacy of the procedure is assessed by the extent to which

it can recognize and implement the authentic will of the people as determined by the respective leader. An election proves itself to have been legitimate, rather than corrupted and subjected to undue influence, if it results in victory for the populists.

Third, for populists any participation and influence of non-citizens or international institutions is a problem. If the foundation of legitimacy is the will of the people, then it is not a big step to discredit the influence of international institutions, international law, or the voices of an international civil society as an unjustified interference by external actors in the national democratic process. Yet the opposite is the case: Taking into account interests and rights of outsiders in a procedurally and substantively adequately structured way is a precondition for the legitimacy of national democratic processes. The open constitutional state, embedded in an international legal community and establishing a public sphere that integrates and reflects external voices and concerns, is not in tension with genuine democracy, but establishes the structures that assure its legitimacy.[3]

There remains a final point: If the will of the people is imagined as uniform, and persistent dissent is problematic, then the focus shifts to the extra-political features that assure the sufficient homogeneity of the people as a necessary precondition for the possibility to achieve such a will. "The people" in such a conception are not simply, as Kant put it, a multitude of persons under the jurisdiction of the state (einer Menge von Menschen unter Rechtsgesetzen). The regulative ideal underlying citizenship is not that everyone who happens to legally reside within the jurisdiction in the long term should have it as a free and equal human being. Instead the focus shifts to the existence of homogeneity-assuring criteria, however they may be specified. Many minorities, defined by deviant religious, ethnic, racial or cultural norms will then be excluded and deemed not to belong to the genuine people, the People with a capital P, or "the Demos". Yet the only precondition for the stability of liberal constitutional democracy is a citizenry that is able to recognize and respect other citizens as free and equal partners and the constitution as the legal framework structuring democratic practices of collective self-determination. More than the integration of immigrant minorities that may in part not share such an understanding, the integration of national authoritarian populists who also lack such an understanding has become a significant problem for constitutionalism.

Once populist authoritarian nationalists have taken over the government, as they have in Russia, Turkey, Hungary and Poland, the question arises how, if at all, liberal constitutional democracy can survive. The question of constitutional resilience is best posed before that happens: How should a constitution be designed, what kind of institutional and legal choices are the most promising to help keep the channels of political change genuinely open and a system of fair political competition functioning even under an authoritarian government? One of the advantages of our darkening times is that this is a question we can ask drawing profitably on the experiences made elsewhere, in Europe and beyond.

SUGGESTED CITATION Kumm, Mattias: *How populist authoritarian nationalism threatens constitutionalism or: Why constitutional resilience is a key issue of our time*, VerfBlog,

2018/12/06, <https://verfassungsblog.de/how-populist-authoritarian-nationalism-threatens-constitutionalism-or-why-constitutional-resilience-is-a-key-issue-of-our-time/>, DOI: <https://doi.org/10.17176/20190211-225638-0>.